IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALLIANCE FOR COMMUNITY MEDIA, et al., Petitioners, v. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, Respondents.	))))))))))	No. 07-3391

OPPOSITION OF FEDERAL COMMUNICATIONS COMMISSION TO JOINT MOTION FOR STAY PENDING JUDICIAL REVIEW

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After finding substantial evidence that local franchising authorities ("LFAs") were unreasonably impeding the entry of competitors into the cable television market, the Federal Communications Commission adopted rules to enforce the statutory prohibition against unreasonable refusals to award competitive cable franchise applications.[1] These rules are reasonably designed to hasten the development of competition in a market long dominated by incumbent cable operators. Such competition will provide consumers with more choices and lower prices.

Although this lawsuit was filed nearly three months ago and most of the rules have been in effect since April 20, petitioners now ask the Court, on the eve of merits briefing, to stay the rules pending review. As we explain below, this stay request is procedurally defective and, in any event, does not come close to meeting the demanding test for extraordinary relief. Nor have petitioners given this Court any good reason to delay the American public's enjoyment of the benefits of increased cable competition. The Court should deny the motion for stay.

BACKGROUND

Any company seeking to offer "cable service"[2] as a "cable operator"[3] must comply with the cable franchising provisions of Title VI of the Communications Act, 47 U.S.C. §§ 521-573. Section 621(b)(1) of the Act, 47 U.S.C. § 541(b)(1),

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[1] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992,* 22 FCC Rcd 5101 (2007) ("*Order*").

[2] *See* 47 U.S.C. § 522(6) (defining "cable service").

[3] *See* 47 U.S.C. § 522(5) (defining "cable operator").

prohibits cable operators from providing cable service without first obtaining a franchise. Section 621(a)(1), in turn, circumscribes the power of local franchising authorities to award or deny such franchises: "A franchising authority may award … 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and *may not unreasonably refuse to award an additional competitive franchise*." 47 U.S.C. § 541(a)(1) (emphasis added).

In the *Order* on review, the Commission took important steps to improve implementation of the pro-competitive objectives underlying section 621(a)(1) in the face of evidence that, in many areas, the current operation of the local franchising process had become an unreasonable barrier to competitive entry.[4]

Recognizing that prolonged delays in the process may amount in practice to unreasonable refusals to award franchises, the Commission established time limits for LFAs to render decisions on competitive franchise applications. It found that applicants (such as telephone companies) with existing authorizations for access to rights-of-way would not cause serious disruption when using that pre-existing access to provide cable television. In addition, these companies have typically already demonstrated their financial and technical fitness as local service

[4] Among other things, the agency found evidence that the franchising process often takes too long, that some LFAs impose unreasonable "build-out" and "level playing field" requirements that force new entrants to match the geographic scope and franchise terms of fully-deployed incumbent cable operations, and that some LFAs coerce franchise applicants to make significant in-kind concessions unrelated to the provision of video services. *Order* ¶¶ 14-52. The record showed, for example, that LFAs had asked franchise applicants to purchase street lights, provide cell phone subsidies for town employees, and fund a $50,000 scholarship with additional annual contributions. *Id.* ¶ 43.

providers. Accordingly, the Commission determined that such applicants "should be subject to a shorter time frame for review than other applicants." *Order* ¶ 70. It set a 90-day time limit for LFAs to issue final decisions on applications from entities with existing rights-of-way access, and a time limit of six months for final action on applications from entities that do not have such access. *Id.* ¶¶ 71-72. To ensure compliance with these time limits, the FCC declared that an LFA's failure to meet the pertinent deadlines would result in an application's being "deemed granted" on an interim basis until the LFA issues a final decision. *Id.* ¶ 77.

The Commission predicted that such "deemed" grants would be rare, particularly in light of further guidance it was providing to narrow the "list of legitimate issues to be negotiated" between applicants and LFAs. *Order* ¶ 71; *see also id.* ¶¶ 70, 81 & n.261. In this regard, the Commission clarified that LFAs would violate section 621(a)(1) if they declined to award a competitive franchise because of the applicant's unwillingness to accept: (1) unreasonable build-out requirements (*id.* ¶¶ 82-93); (2) demands for payments or contributions that would unlawfully circumvent the statutory franchise fee cap (*id.* ¶¶ 94-109); (3) unreasonable demands concerning public, educational, and government ("PEG") channels and institutional networks ("I-Nets") (*id.* ¶¶ 110-120); and (4) demands with respect to non-cable services and facilities (*id.* ¶¶ 121-124).

To ensure that its *Order* would have the desired effect, the agency declared that local laws, regulations, and requirements that were inconsistent with the new federal rules would be preempted.[5]

ARGUMENT

I. THE STAY APPLICATION IS PROCEDURALLY DEFECTIVE.

The stay application suffers from three threshold defects.

A. The Court should deny petitioners' stay motion because they did not first seek a stay from the FCC as required by FRAP 18(a)(1). *See Baker v. Adams County/Ohio Valley Sch. Bd.*, 310 F.3d 927, 930 (6th Cir. 2002) (per curiam) ("This is '[t]he cardinal principle of stay applications.'" (quoting 16A Charles Alan Wright et al., *Federal Practice and Procedure* § 3954 (3d ed. 1999)).[6] Petitioners assert that asking the agency for a stay would have been "impracticable" – even though they had more than three months to do so – because, in their judgment, such a request would have been futile. Motion at 1 n.3 (quoting FRAP 18(a)(2)(A)(i)). They base this speculative assumption on the FCC Chairman's responses to objections raised by a few Members of Congress. Merely showing that the FCC adopted an order over the objection of a few legislators is clearly insufficient to demonstrate futility; if that were enough, there would almost never

[5] *Order* ¶¶ 125-138 (citing 47 U.S.C. § 556(c)). At the same time, the FCC made clear that it was *not* preempting any state level franchising decisions or state laws governing specific aspects of the franchising process because it lacked an adequate record to determine whether preemption of such laws was warranted. *Id.* ¶ 126.

[6] *Baker* involved an application for stay pending appeal from the district court, but "[t]he same considerations which justify the requirement of an initial application to the district court for a stay pending appeal support the requirement of an initial application to the agency pending review." FRAP 18 advisory committee's note.

be any obligation to seek a stay from the agency first, since virtually every significant action the FCC takes arouses some congressional opposition. Such an interpretation of FRAP 18 would conflict with the rule's plain terms, which "ordinarily" require petitioners to request a stay from the agency. FRAP 18(a)(1).

B. Petitioners are not entitled to equitable relief in this case because they unduly delayed in requesting a stay. "It is well settled that 'equity aids the vigilant.' Injunctive relief is reserved for those who manifest reasonable diligence in asserting their rights to equitable protection." *Reams v. Vrooman-Fehn Printing Co.,* 140 F.2d 237, 242 (6th Cir. 1944). Here, however, petitioners dawdled. The *Order* was released on March 5, and petitioners filed their petitions for review on April 3. Yet they waited 76 days from the initiation of the case to request a stay. As a result, we are on the eve of merits briefing – petitioners' briefs are due July 18 – and most aspects of the *Order* have already taken effect.

Given their foot-dragging, it is hard to take seriously petitioners' claims that they face imminent irreparable harm without a stay. Because petitioners slept on their rights, they have no valid claim to equitable relief. *See Kay v. Austin,* 621 F.2d 809, 813 (6th Cir. 1980) (under the laches doctrine, a party is not entitled to equitable relief if he does not press his claims expeditiously).

C. Finally, the stay application is in large part moot. Petitioners seek a "stay [of] the effective date" of all "the rules and policies adopted" in the *Order*. Motion at 1, 20; *see* 28 U.S.C. § 2112(a)(4) (authorizing the court of appeals to "stay the effective date of the order"). However, with the exception of the portion of the *Order* containing information collection requirements (which is not yet effective), all the rules adopted in the *Order* took effect on April 20. *Order* ¶ 155; 72 Fed. Reg. 13189 (March 21, 2007). Their effectiveness thus can no longer be stayed. *See Reed v. Rhodes,* 472 F. Supp. 603, 605 (N.D. Ohio 1979) ("A stay does not reverse, annul, undo, or suspend what has already been done ....").

II. PETITIONERS DO NOT MEET THE TEST FOR A STAY.

In any event, petitioners have failed to satisfy the stringent standard for the extraordinary relief they seek. In assessing whether a stay pending judicial review is warranted, the Court must consider four factors: "1) whether the applicant has demonstrated a likelihood of success on the merits; 2) whether the applicant will be irreparably injured absent a stay; 3) whether issuance of the stay will substantially injure the other interested parties; and 4) where the public interest lies." *Nader v. Blackwell,* 230 F.3d 833, 834 (6th Cir. 2000). None of these factors supports a stay in this case.

A. Petitioners Are Not Likely To Prevail On The Merits.

To obtain a stay, petitioners must show "more than the mere possibility of success on the merits." *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog,* 945 F.2d 150, 153 (6th Cir. 1991) (internal quotations omitted). "Ordinarily the party seeking a stay must show a strong or substantial likelihood of success." *Ohio ex rel. Celebrezze v. NRC,* 812 F.2d 288, 290 (6th Cir. 1987). Petitioners have made no such showing. Although their motion raises a hodgepodge of claims, petitioners are unlikely to prevail on any of them.

Statutory Authority. There is no basis for petitioners' claim that the FCC lacks statutory authority to adopt rules implementing section 621. Section 201(b) empowers the agency to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b). Section 201(b) "means what it says: The FCC has rulemaking authority to carry out" the provisions of the Communications Act. *See AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366, 378 (1999).[7] Indeed, courts have repeatedly recognized that Congress authorized the FCC to adopt rules interpreting section 621.[8]

Petitioners nevertheless seem to think that because section 635 of the Act provides for judicial review of any "final determination" made by an LFA, the FCC lacks authority to adopt rules governing local franchising proceedings under section 621(a)(1). Motion at 4-7. But the statute does not say that the courts have *exclusive* jurisdiction over all franchise-related matters. Therefore, it was entirely reasonable for the Commission to conclude that it had concurrent jurisdiction in this area.

When Congress provides a mechanism for judicial review to remedy a violation of a statutory provision, it does not deprive an agency of the authority to

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[7] The Court should reject petitioners' contention (Motion at 7-8) that section 201(b) "does not extend to the Title VI cable franchising provisions." Neither the language of section 201(b) nor the Supreme Court's analysis in *AT&T* supports such a cramped construction of the statute.

[8] *See, e.g., City of Chicago v. FCC,* 199 F.3d 424, 428 (7th Cir. 1999), *cert. denied,* 531 U.S. 825 (2000); *National Cable Television Ass'n v. FCC,* 33 F.3d 66, 70-75 (D.C. Cir. 1994); *ACLU v. FCC,* 823 F.2d 1554, 1573-75 (D.C. Cir. 1987) (per curiam), *cert. denied,* 485 U.S. 959 (1988). As these cases make clear, the FCC did not need to rely on "ancillary" authority to issue the *Order*. Thus, petitioners' argument concerning the agency's ancillary jurisdiction (Motion at 7-8) is beside the point.

issue rules interpreting and implementing that statutory provision.[9] By adopting rules that give content to the ambiguous phrase "unreasonably refuse to award" in section 621(a)(1), the FCC was merely performing a task common to all federal agencies: interpreting the statute that it administers.[10]

Preemption. Petitioners urge the Court to "assume that local laws are not superseded by federal law unless preemption is the clear and manifest purpose of Congress." Motion at 8-9 (internal quotations omitted). Congress expressly preempted any state or local law that "is inconsistent with" the Act. 47 U.S.C. § 556(c). Therefore, the Act preempts local laws that conflict with the statutory ban on "unreasonabl[e] refus[als] to award" competitive cable franchises. *See* 47 U.S.C. § 541(a)(1). The only question here is whether the FCC has adopted rules that reasonably define the scope of this preemption. Where (as here) an agency exercises its congressionally delegated rulemaking power to promulgate preemptive federal rules, "[a] pre-emptive regulation's force does not depend on

[9] *See Order* ¶ 56. For example, although the Act provides for judicial review of disputes concerning network sharing agreements between local phone companies and their competitors, 47 U.S.C. § 252(e)(6), the Supreme Court held that the FCC had authority to issue rules governing the resolution of such disputes. *AT&T,* 525 U.S at 377-85. Likewise, the agency had authority to adopt the rules at issue here.

[10] *See Chevron USA v. Natural Resources Defense Council,* 467 U.S. 837 (1984); *Capital Network System, Inc. v. FCC,* 28 F.3d 201, 204-06 (D.C. Cir. 1994) (deferring to FCC's reading of ambiguous statutory term "unreasonable"). Contrary to petitioners' assertion (Motion at 9), the FCC's reading of the Act is entitled to deference even when the courts have concurrent jurisdiction. *See, e.g., National Cable & Telecommunications Ass'n v. Brand X Internet Services,* 545 U.S. 967, 980-97 (2005) ("*Brand X*") (deferring to the FCC's statutory construction even though it differed from the Ninth Circuit's prior reading of the same statute); *AT&T,* 525 U.S. at 386-88, 392-97 (deferring to the FCC's statutory interpretation on issues over which courts have concurrent jurisdiction).

express congressional authorization to displace state law." *City of New York v. FCC,* 486 U.S. 57, 64 (1988) (internal quotations omitted).

90-Day "Shot Clock." Petitioners attack the FCC's decision to require LFAs to grant or deny certain franchise applications within 90 days. They maintain that factors outside of LFAs' control – including compliance with unspecified state and local legal obligations – could prevent LFAs from acting within 90 days. Motion at 9-10. Aside from conclusory and unsupported assertions, however, petitioners offer no evidence as to why the 90-day deadline might be hard to meet.

By contrast, the FCC has fully explained why the 90-day time limit is reasonable. That time limit applies only to franchise applicants that have already gained access to rights-of-way (*e.g.,* telephone companies). Because rights-of-way issues are such an important part of franchise negotiations, the Commission reasoned that LFAs would need much less time to negotiate franchises with applicants that are already authorized to occupy rights-of-way – well-established companies that have demonstrated their legal, technical, and financial fitness. *Order* ¶¶ 70-71. For such applicants, the "list of legitimate issues to be negotiated is short," and the *Order* has "narrow[ed] those issues considerably." *Id.* ¶ 71. Furthermore, "an LFA may toll the running of the 90-day ... period if it has requested information from the franchise applicant and is waiting for such information." *Id.* ¶ 75. Finally, if an LFA is not satisfied with an applicant's proposal, it is free to deny the application. Thus, when petitioners complain that LFAs must "negotiate all of the terms of a brand new franchise" within 90 days

(Motion at 11), they significantly exaggerate the burden placed on LFAs by the so-called "shot clock."

Petitioners argue that it is irrational for the FCC to require the negotiation of a new franchise within 90 days when the statute gives LFAs more time to modify a single term in an existing franchise. Motion at 10-12. But the agency reasonably explained that policy concerns justified a tighter time frame for processing competitive franchise applications "because the costs associated with delay are much greater with respect to entry." *Order* ¶ 71. Consumers "are not deprived of service" while an LFA mulls over a modification or renewal request by an incumbent franchisee. *Ibid.* By contrast, LFA inaction on a competitive franchise application "deprives consumers of the benefits of cable competition." *Ibid.*

Essentially, petitioners object to the line that the Commission drew in setting the 90-day time limit. As this Court has observed, however, administrative lines "need not be drawn with mathematical precision." *Kirk v. Secretary of Health & Human Services,* 667 F.2d 524, 532 (6th Cir. 1981), *cert. denied,* 461 U.S. 957 (1983). The FCC reasonably selected a 90-day deadline from among a range of proposals. *See Order* ¶ 68. Courts are "generally unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that lines drawn ... are patently unreasonable, having no relationship to the underlying regulatory problem." *Covad Communications Co. v. FCC,* 450 F.3d 528, 541 (D.C. Cir. 2006) (internal quotations omitted). Given the record evidence that LFAs can in fact act on franchise applications within 90 days (*see Order* ¶¶ 16, 25 & n.82), petitioners cannot show that it was "patently unreasonable" to impose a 90-day time limit on LFA review of applications by companies that already occupy rights-of-way.

Petitioners also complain (Motion at 12-13) that the "shot clock" will not apply uniformly to all LFAs. It is true that the Commission did not preempt any state franchising laws governing specific aspects of the franchising process, including state laws that give state agencies and LFAs longer than 90 days to act on competitive franchise applications. *Order* at n.2. Therefore, in some states, LFAs will be exempt from the 90-day time limit. Contrary to petitioners' assertion, however, there is nothing unreasonable about this. The FCC properly declined at this time to preempt certain state laws (many of which involve state-level franchising decisions) because it lacked "a sufficient record to evaluate whether and how such state laws may lead to unreasonable refusals to award additional competitive franchises." *Id.* ¶ 126. As a result, for the time being, the agency limited its preemption to local franchising laws. This incremental approach to the issue was sensible and permissible.[11]

In states that do not authorize a review period longer than the one prescribed by the *Order*, if an LFA does not meet the FCC's deadline for acting on a franchise application, the *Order* provides that "the LFA will be deemed to have granted the applicant an interim franchise based on the terms proposed in the application."

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[11] *See Brand X,* 545 U.S. at 1002 (the FCC "need not immediately apply the policy reasoning" of its decisions "to all types" of entities, but may choose to proceed "incrementally"); *Cincinnati Bell Tel. Co. v. FCC,* 69 F.3d 752, 767 (6th Cir. 1995) ("agencies ordinarily may proceed one step at a time" rather than "deal with every aspect of a problem in one proceeding").

Order ¶ 77. Petitioners claim that the FCC lacks authority to create an interim franchise. Motion at 13. To the contrary, section 201(b) authorizes the agency to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b). That authority includes the power to adopt "prophylactic" rules to curb abuses of the franchising process.[12] Exercising that authority, the FCC reasonably determined that it could best enforce the Act's prohibition on unreasonable refusals to award competitive cable franchises by adopting a rule that provides for interim franchises whenever LFAs unreasonably delay action on pending applications. Without the prospect of an interim franchise to spur action, LFAs that have been engaging in unreasonable delay would have little incentive to alter their behavior. The FCC reasonably predicted that interim franchises "will be the exception rather than the rule because LFAs will generally comply with the Commission's rules and either accept or reject applications within the applicable time frame." *Order* ¶ 81.

Build-Out Restrictions. Petitioners wrongly assert (Motion at 13) that LFAs have an "unconditional right" to impose build-out requirements on franchisees. Far from establishing such a right, section 621(a)(4)(A) *limits* LFAs' authority to impose build-out mandates. *See* 47 U.S.C. § 541(a)(4)(A). Moreover, that provision "does not address ... whether it would be unreasonable for LFAs to impose certain build-out requirements on competitive cable applicants." *Order* ¶

[12] *Cf. Southwestern Bell Corp. v. FCC,* 896 F.2d 1378, 1382 (D.C. Cir. 1990) (upholding a "prophylactic" FCC rule designed to curb cost accounting abuses by telephone companies).

84. To answer that question, the Commission read section 621(a)(4)(A) in conjunction with the Act's ban on unreasonable refusals to award competitive franchises; and it properly prohibited LFAs from conditioning such franchises on unreasonable build-out requirements. *Id.* ¶¶ 83-91.[13]

Petitioners suggest that the *Order*'s build-out restrictions will allow new cable providers to bypass low-income neighborhoods. Motion at 14. That is just not so. The Commission emphasized that nothing in the *Order* "is intended to limit LFAs' authority to appropriately enforce Section 621(a)(3) ... to ensure that their constituents are protected against [this sort of] discrimination." *Order* ¶ 92.[14]

Petitioners also complain that the FCC's build-out restrictions are too vague. Motion at 14. To the contrary, the *Order* provides extensive guidance concerning which types of build-out mandates are reasonable or unreasonable. *See Order* ¶¶ 89-90. In that respect, the *Order* is much more specific than the statute. Of course, should LFAs have questions about the propriety of any particular practices, the FCC stands ready to provide further clarification if necessary.

Franchise Fees. There is no merit to petitioners' assertion (Motion at 14-15) that the FCC erred in applying the Act's franchise fee cap to in-kind payments.[15] The Act broadly defines "franchise fee" to include "any tax, fee, or

[13] Although petitioners suggest otherwise, the Act "manifestly does not require universal [cable] service." *ACLU,* 823 F.2d at 1580.

[14] *See* 47 U.S.C. § 541(a)(3) (LFAs shall ensure that "access to cable service is not denied to any group ... because of the income of the residents of the local area in which such group resides").

[15] Under the Act, franchise fees for any 12-month period may not exceed five percent of a franchisee's gross revenues from cable service. 47 U.S.C. § 542(b).

assessment of any kind" imposed by LFAs on cable operators "solely because of their status as such." 47 U.S.C. § 542(g)(1) (emphasis added). The Commission reasonably found that in-kind payments fall within this definition. *Order* ¶¶ 105-108.

Petitioners' contrary reading of the statute makes little sense. Under petitioners' reading, a requirement that a franchisee pay an LFA for the construction of a library would fall within the franchise fee cap, but a requirement that the franchisee itself build a library would not be covered.[16]

"Level Playing Field" Laws. Contrary to petitioners' suggestion (Motion at 15-16), the FCC had good reason to preempt local laws that impose so-called "level playing field" requirements on new cable franchisees. The record showed that such laws unreasonably impede competitive entry. *Order* ¶ 138.

Petitioners argue that it was unreasonable for the FCC to preempt local laws of this sort but not similar state laws. The Commission explained, however, that it declined to preempt such state laws because it lacked "a sufficient record to evaluate whether and how such state laws may lead to unreasonable refusals to award additional competitive franchises." *Order* ¶ 126. If the agency later finds evidence that state "level playing field" laws are obstructing competitive entry, it may well decide to preempt those laws. For now, however, given the limits of the

[16] Furthermore, petitioners are mistaken when they claim (Motion at 15) that the FCC's ruling on in-kind payments means that previously negotiated mandates "to provide free cable service" to various government entities will now be subject to the franchise fee cap. The *Order*'s analysis of in-kind payments was expressly limited to payments that do *not* involve the provision of cable service. *See Order* ¶¶ 105-108.

record in this proceeding, the Commission properly decided to preempt only local "level playing field" laws.

Notice. Finally, petitioners claim that the FCC failed to provide adequate notice of some of the rules it adopted. Motion at 16. This argument lacks merit. The APA requires notice of "either the terms or substance of the proposed rule *or a description of the subjects and issues involved.*" 5 U.S.C. § 553(b)(3) (emphasis added). The notice "need not specify every precise proposal which [the agency] may ultimately adopt as a rule"; it need only "be sufficient to fairly apprise interested parties of the issues involved." *Nuvio Corp. v. FCC,* 473 F.3d 302, 310 (D.C. Cir. 2006) (internal quotations omitted). The notice that initiated this proceeding satisfied that standard. It sought "comment on what, if any, specific rules, guidance or best practices [the FCC] should adopt to ensure that the local cable franchising process does not unreasonably impede competitive cable entry."[17] Several commenters contended that LFA practices concerning franchise fee assessments, PEG/I-NET obligations, and mixed use regulation were erecting unreasonable barriers to entry. *See Order* at nn.316, 334-40, 385-88, 397-400. In response to these comments, the FCC adopted rules to address these issues. Those rules were a "logical outgrowth" of the notice. *See Covad,* 450 F.3d at 548-49.

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[17] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992,* 20 FCC Rcd 18581, 18591 (¶ 21) (2005).

B. Petitioners Have Not Established Irreparable Harm.

Even if petitioners could demonstrate a likelihood of success on the merits, they would not be entitled to a stay because they have not established that they would be irreparably harmed without one. The Supreme Court has stressed that the "basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959)).[18] In assessing whether a party seeking a stay has made a sufficient showing of irreparable harm, this Court weighs three factors: "(1) the substantiality of the injury alleged, (2) the likelihood of its occurrence, and (3) the adequacy of the proof provided." *Ohio ex rel. Celebrezze*, 812 F.2d at 290. The harm alleged "must be both certain and great, rather than speculative or theoretical." *Ibid.* "In order to substantiate a claim that irreparable injury is likely to occur, a movant must provide some evidence that the harm has occurred in the past and is likely to occur again." *Michigan Coalition,* 945 F.2d at 154. Under this standard, petitioners have failed to demonstrate any harm that would justify a stay in this case.

First, there is no basis for petitioners' claim that the *Order* irreparably harms LFAs because, "if an LFA cannot meet the 90-day [time limit for action], an applicant is permitted to disrupt public rights-of-way and immediately begin

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[18] *See also Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 103 (6th Cir. 1982) (vacating preliminary injunction because district court failed to make finding of irreparable injury).

providing cable service ... pursuant to the terms of the applicant's offer." Motion at 17. As an initial matter, the 90-day rule does not force LFAs to approve *any* franchise applications. It simply requires LFAs to make a yes-or-no decision within 90 days. Furthermore, the 90-day deadline applies only to applicants that already have access to rights-of-way. *Order* ¶¶ 70-71. The "deemed" grant of any such franchise proposals would involve minimal rights-of-way disruption.

More fundamentally, petitioners' speculative premise that "deemed" grants pose a genuine risk of irreparable harm ignores the fact that the Commission, upon examining the administrative record, concluded that the 90-day and six-month deadlines it established for LFA action were more than adequate to enable LFAs to carry out their franchising responsibilities.[19] Petitioners challenge the agency's authority to impose such deadlines, but they provide no concrete basis to dispute the Commission's expert predictive judgment that "deemed" grants will likely be very rare. *Order* ¶ 71.[20]

Petitioners alternatively suggest that the deadline for LFA action may lead to a "multiplicity of lawsuits brought by applicants," as LFAs deny applications simply to avoid "deemed" grants. Motion at 17. The Supreme Court has stated, however, that "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Board v. Bannercraft*

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[19] *See Order* ¶¶ 68-72.

[20] *See Cellnet Communications, Inc. v. FCC,* 149 F.3d 429, 441 (6th Cir. 1998) (the FCC's "predictive judgments about areas that are within the agency's field of discretion and expertise are entitled to particularly deferential review"). In an attempt to counter the FCC's expert predictive judgment, petitioners offer nothing more than vague and unsubstantiated assertions of harm. *See* Motion, Exhibit F.

Clothing Co., 415 U.S. 1, 24 (1974). In any event, petitioners' supposition that the FCC's rules will lead to numerous eleventh-hour denials and an increased likelihood of litigation is pure speculation. The *Order* tolls the deadline for LFA action where the LFA has requested needed information from the applicant and is awaiting a response. *Order* ¶ 75. And both parties may agree to extend the deadlines that otherwise apply under the rules if negotiations are proceeding in good faith and more time is needed to iron out an agreement. *Id.* ¶ 73. Applicants and LFAs may reasonably perceive that such voluntary agreements are likely to yield quicker and more satisfactory conclusions to the franchising process than litigation would.

Petitioners also allege that the *Order* causes irreparable harm by forcing LFAs to choose between violating state or federal law. Motion at 18-19. The only support they offer for this assertion is the claim that "[m]any" *unidentified* "state laws do not expressly address the maximum amount of time permitted for franchising approvals, but specify the processes [*e.g.*, public hearings, creating ordinances] LFAs must follow with respect to approvals of cable franchises." Motion at 18. Petitioners contend that, "[s]ince these laws do not expressly '*circumscribe*' the timing aspect of an LFA's decision, they *appear* not to obviate an LFA's new 90-day" deadline for action on the franchise application. *Id.* (emphasis added to "appear") (citing *Order* ¶ 126). To the extent that petitioners can identify a specific state law that presents a genuine conflict, they may bring that alleged conflict to the Commission's attention for possible clarification or relief. However, their musings regarding the effect that *unidentified* laws *appear* to have under the terms of the *Order* fall far short of the requisite showing of irreparable harm that is "both certain and great, rather than speculative or theoretical." *Ohio ex rel. Celebrezze*, 812 F.2d at 290.

Finally, petitioners offer the makeweight argument that, "[b]ecause franchises are long-term agreements, the[] onerous concessions forced upon LFAs [by the *Order*] during the pendency of this appeal will be irreparable and long-term in nature" even if the *Order* is vacated following review. Motion at 19. But there is no reason to assume that LFAs "will find themselves forced into agreements with the applicants' defined terms." *Ibid.* In any event, nothing in the *Order* prevents LFAs from insisting upon "change of law" provisions in franchise agreements to protect their interests. And, even without such provisions, this Court generally possesses the remedial power on review to "undo what is wrongfully done" by virtue of an unlawful order. *United Gas Improvement Co. v. Callery Properties*, 382 U.S. 223, 229 (1965). The availability of such "corrective relief ... at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Sampson*, 415 U.S. at 90.

C. A Stay Would Harm Other Parties And The Public Interest.

In adopting the *Order*, the Commission found substantial record evidence that "unreasonable delays in the franchising process have obstructed and, in some cases, completely derailed attempts to deploy competitive video services." *Order* ¶ 22; *see also id.* ¶¶ 23-30. The Commission also found ample evidence that LFA build-out requirements (as well as a host of other practices) were substantially impeding competitive entry. *Order* ¶¶ 31-42. A stay pending review would deny prospective cable franchisees the relief from these unreasonable franchising practices that the *Order* provides, thereby denying consumers the competitive benefits of greater choice and lower rates in the video services marketplace. *See Order* ¶¶ 50-52 (cataloguing the benefits of cable competition). The *Order* on review reflects the Commission's considered judgment regarding where the public interest lies. As the Supreme Court has repeatedly emphasized, "the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference." *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981).[21]

CONCLUSION

For the foregoing reasons, the Court should deny the motion for stay.

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[21] *See also FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 810 (1978); *FCC v. WOKO, Inc.*, 329 U.S. 223, 229 (1946); *Hamlin Testing Labs., Inc. v. United States Atomic Energy Comm'n*, 337 F.2d 221, 222-23 (6th Cir. 1964) (agency's judgments regarding the public interest are entitled to weight in the Court's consideration of the equities on requests for stay).

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Alliance For Community Media, et al., Petitioners,

v.

Federal Communications Commission and USA, Respondents.

Certificate Of Service

I, Tamika S. Parker, hereby certify that the foregoing "Opposition Of Federal Communications Commission To Joint Motion For Stay Pending Judicial Review" was served this 29th day of June, 2007, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

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